

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 11

BRITTHAVEN OF EDENTON, INC.

Employer

and

Case No. 11-RC-6587

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 426T

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Petitioner seeks to represent a unit comprised of all full-time and regular part-time certified nursing assistants (“CNAs”), laundry employees, kitchen employees, housekeeping employees, activities employees, and the supply clerk who work at the Employer’s nursing home in Edenton, North Carolina, excluding registered nurses (“RNs”), licensed practical nurses (“LPNs”), the maintenance supervisor, the assistant maintenance supervisor, the kitchen supervisor, the housekeeping assistant supervisor, the medical records clerk, the accounts payable clerk, the accounts receivable clerk, the social worker, the administrator, guards, supervisors, and all other employees excluded by the Act.

At the hearing, the parties agreed to various other exclusions and inclusions in the unit. The parties stipulated that the following persons should be excluded from the unit as acknowledged supervisors: Diane Nixon, Administrator; Lisa Cooper, Director of Nursing (“DON”); Zerrana Stallings, Activities Director; James Morgan, Housekeeping and Laundry Supervisor; Cathy Bowen, Dietary supervisor; and the five RNs at the

facility. The parties also agreed to exclude the accounts payable clerk, the accounts receivable clerk, the social worker, the ward secretary,¹ and one dietary employee, Kelly O’Kleshen.² In addition, the parties agreed to include the supply clerk in the unit.

The parties were unable to agree with respect to other classifications. Thus, the Employer contends that the petitioned-for unit is inappropriate, and that the appropriate unit must include LPNs. The Petitioner argues that LPNs are supervisors and should be excluded from the unit. As a second basis for exclusion, the Petitioner asserts that LPNs should not be included in the unit as they are technical employees.

The Employer further seeks to include the medical records clerk, the assistant medical records clerk, the assistant maintenance supervisor, and the admissions clerk, while the Petitioner desires to exclude them. Finally, at the hearing and in their briefs, the parties took no positions on the supervisory status of three positions: the maintenance supervisor, the kitchen supervisor, and the housekeeping assistant supervisor. In its brief, the Employer seeks to include those classifications in the unit, while the Petitioner seeks to exclude them.

The parties submitted briefs which have been carefully considered. As shown below, I will first consider whether the LPNs are supervisors, and, if they are not, whether they should be included in the unit. Next, I will review the remaining classifications in dispute and determine whether they are properly included or excluded from the unit. With respect to the LPNs, I conclude they are not supervisors under the Act. I further conclude, however, that the LPNs are not required to be included in the appropriate unit,

¹ At the hearing, the parties entered into a stipulation to exclude the ward secretary. In its brief, the Petitioner now urges that the position of ward secretary or clerk be included in the unit.

² The parties stipulated that O’Kleshen, who is the daughter of the DON, was closely aligned with management and that it would be inappropriate to include her in the unit.

and I shall, therefore, exclude them. With respect to the remaining classifications, I conclude that they share a substantial community of interest with employees included in the unit, and I shall, therefore, include them.

A. Background: The Employer's Operations

The Employer, a North Carolina corporation, operates a nursing home located in Edenton, North Carolina. The facility has a capacity for approximately 130 residents and is staffed by 124 employees, including supervisors. Included among those employees are five RNs, 50-54 CNAs, 20 LPNs, 17 kitchen employees, eight housekeeping employees, and three laundry employees. CNAs work three shifts: 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., and 11:00 p.m. to 7:00 a.m. LPNs have the following shifts: 6:45 a.m. to 3:15 p.m., 2:45 p.m. to 11:15 p.m., and 10:45 p.m. to 7:15 a.m. RNs work the same first shift as LPNs, but generally do not work on second or third shift unless they are filling in for someone. Dietary employees work from 5:45 a.m. to 1:45 p.m. and 12:30 p.m. to 8:00 p.m. A few janitors work from 7:30 a.m. to 3:30 p.m.; the remaining housekeeping staff works from 8:00 a.m. to 4:00 p.m. The one activities employee works a split shift.

The facility consists of four wings or halls. The CNAs, LPNs, and RNs provide direct care to the residents located on the four wings. A licensed RN must be at the facility seven days a week. Diane Nixon, the facility's Administrator, is the highest authority at the facility, with Lisa Cooper, DON, directly subordinate in the management hierarchy.

All employees have identical benefits except that department heads and their assistants get paid for the first day that they are out on sick leave, while all other

employees get paid starting the second day out. All employees share the same break room, same parking lot, and same restroom facilities.

B. The supervisory status of LPNs

As shown above, the Employer asserts that the appropriate unit must include LPNs, whereas the Petitioner contends that LPNs are supervisors and should be excluded. The Petitioner contends that the LPNs are supervisors within the meaning of the Act based upon their authority to assign work, responsibly direct, discipline, and evaluate employees. The Petitioner further relies on secondary criteria to assert that LPNs are supervisors. As shown below, I will first set forth the applicable principles with respect to supervisory status. Next I will discuss the Petitioner's contentions with respect to the duties and authorities of LPNs as they relate to supervisory indicia. Having carefully considered the parties' arguments, I am persuaded that the LPNs are not supervisors within the meaning of the Act.

1. Applicable Principles

Section 2(3) of the Act excludes "any individual employed as a supervisor" from the Act's definition of "employee," thereby excluding that individual from the Act's protections, including the right to form or join a union. Section 2(11) defines a "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well settled that supervisory status is conferred by the possession of any one of those primary indicia. NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706,

706-707 (2001). The burden of proving supervisory status rests on the party asserting that an individual is a supervisor. Kentucky River, 532 U.S. at 706. In that regard, if the evidence is in conflict or inconclusive with respect to indicia, that evidence will be insufficient to establish supervisory status. Phelps Community Medical Center, 295 NLRB 486, 490 (1989). Moreover, the fact “[t]hat someone may have . . . theoretical authority, which is not actually exercised, is insufficient to establish that one is a statutory supervisor.” Washington Nursing Home, Inc., 321 NLRB 366, 381 (1996).

It is further settled that “[t]he Board has a duty not to construe the statutory language too broadly because the individual found to be a supervisor is denied employee rights protected under the Act.” Michigan Masonic Home, 332 NLRB 1409, 1409 (2000) (quoting St. Francis Medical Center-West, 323 NLRB 1046, 1047 (1997)). When enacting Section 2(11), Congress emphasized that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors and not “straw bosses, leadmen, set-up men, and other minor supervisory employees.” NLRB v. Bell Aerospace Co., 416 U.S.267, 280-281, 283 (1974).

In order for an individual to be deemed a supervisor, that individual must exercise one of the supervisory indicia in conjunction with independent judgment; the exercise of authority that is merely routine or clerical in nature does not confer supervisory status. Michigan Masonic Home, 332 NLRB at 1409. With respect to independent judgment, the Court in Kentucky River rejected the Board’s conclusion that directing less-skilled employees to deliver services in accordance with employer-specified standards or using ordinary professional or technical judgment, did not constitute independent judgment. 532 U.S. at 713-714, 721. However, two aspects of the Board’s interpretation of

independent judgment were left undisturbed. First, the Court recognized that the term independent judgment “is ambiguous with respect to the degree of discretion required for supervisory status,” and it is within the Board’s discretion to determine what degree of discretion qualifies as independent judgment within the meaning of Section 2(11). *Id.* at 713 (emphasis supplied). Second, the Court also recognized that independent judgment might be reduced below the statutory supervisory threshold by detailed regulations or orders issued by an employer. *Id.* at 713-714.

2. Background: Duties and Authorities of LPNs and CNAs

Three categories of employees provide direct care to the residents: CNAs, who are included in the unit; LPNs, whose status in the unit is at issue; and RNs, who are excluded from the unit as supervisors. As noted above, the facility employs between 50 and 54 CNAs, 20 LPNs, and five RNs. As further shown, both CNAs and LPNs work three shifts with LPNs working an extra 15 minutes at the beginning and end of each shift. LPNs and RNs arrive early on their shifts to receive reports on residents, such as directives on medication changes or additional treatments. The record does not disclose how many CNAs and LPNs work on the first shift; on the second shift there are normally eight CNAs and four LPNs, and on the third shift there are six CNAs and two LPNs.

CNAs are paid \$7.00 per hour to start. Presently, the highest-paid CNA makes \$9.82 an hour. A CNA must have a high school education,³ take a three-four month course through a college, pass a state test, and be registered with the North Carolina Board of Nursing. The primary duties of CNAs are to manage the comfort and physical well-being of residents by helping them with personal care and hygiene, feeding, and

³ The CNA’s job description requires a 10th grade education as a minimum.

other activities of daily living. During the third shift, CNAs work as a group to provide care; on the first and second shifts, CNAs are assigned to specific residents.

LPNs are paid \$13.00 an hour to start. Presently, the highest paid LPN makes \$17.00 an hour. An LPN must have a high school education, complete one year of college in an LPN course, pass a state test, hold a current LPN license, and be registered with the North Carolina Board of Nursing. An LPN's primary duty is to administer medications to residents. Some LPNs spend about 3% of their time helping residents with personal care and the activities of daily living outlined above.

As more fully described below, on second and third shift, LPNs are essentially "in charge" of the residents and monitor the CNAs to be sure that they are properly doing their job. If a problem occurs, an LPN contacts an RN or the DON. From time to time, LPNs make written or oral reports concerning events that take place on their shift.

LPNs appear to receive the same benefits as CNAs except that LPNs are paid for the first day of sick leave, and the record does not establish that CNAs receive that benefit. LPNs do not attend management meetings, although some RNs do. There are regular staff meetings every two weeks attended by RNs, LPNs, CNAs, and sometimes maintenance employees. Sometimes CNAs are excused while RNs and LPNs remain in the meeting.

3. Analysis:

a. Assignment of Work:

With respect to the Petitioner's claim that LPNs assign work to CNAs, the record reflects that one LPN (herein referred to as "the scheduling LPN"), prepares a work schedule for CNAs assigning them to a particular hall on a particular day. The schedule

is the same on a monthly basis except during the holidays. The performance of this routine assignment does not indicate supervisory status. See Ten Broeck Commons, 320 NLRB 806, 810-811 (1996). The record does not disclose the circumstances that would necessitate a change in the work schedule, the manner in which the schedule is assigned during holiday periods, or the identity of the person who would approve such changes. The one example in the record concerning a schedule change was shown to be ordered by an RN, an acknowledged supervisor. If the facility is short staffed, the scheduling LPN has the authority to call a CNA to see if a CNA can work; however, the scheduling LPN cannot require a CNA to come in. The substitute CNA is automatically assigned to the residents of the CNA who is being replaced. There is no evidence as to what criteria the scheduling LPN relies on in selecting whom to call in. The authority to ask but inability to compel employees to come into work constitutes routine judgment. Providence Hospital, 320 NLRB 717, 732 (1996).

The Petitioner also contends that LPNs have the authority to determine when CNAs take their breaks. The record reflects that, normally, a CNA merely informs an LPN that he or she is finished with a particular task and can take a break. The only noted exceptions to that policy are when a resident is in a crisis situation or the fire alarm goes off. The determination of breaks on the basis of resident needs or in other limited circumstances does not amount to independent judgment. See Loyalhanna Care Center, 332 NLRB 933, 935 (2000).

The Petitioner further asserts that LPNs may authorize CNAs to come into work late and leave early. The record merely reflects, however, that if a CNA is going to be late or leave early, she informs an LPN. The record does not establish whether LPNs are

simply recording what an employee reports, subject to independent review, or whether the LPNs are authorized to give final approval to CNAs with respect to arriving late or leaving early. Thus, without more, the LPNs authority in regard to arriving late or leaving early does not amount to independent judgment. See Washington Nursing Home, 321 NLRB 366, 366 n.4 (1996).

The Petitioner also argues that LPNs have the authority to transfer CNAs to different halls. The evidence is also inconclusive on this issue. The Administrator testified that an LPN may consult with another LPN to temporarily move a CNA from another hall if her hall is short-handed. However, the Administrator could recall only one occasion where an LPN had effectuated such a temporary transfer, and that particular transfer was at the behest of an RN. With respect to the frequency of transfers, one CNA testified that such temporary transfers were a “common” occurrence on the second shift, while another CNA on the same shift testified that they rarely occurred. There was no evidence presented on the frequency of such temporary assignments on first or third shift, nor any evidence concerning the criteria used for selecting a particular CNA for temporary transfer. In any event, “[s]uch authority to ask for or to make temporary reassignments between wings to meet obvious staffing needs is limited in scope and practice and ‘is not significantly more complicated than counting’ the number of employees available” and does not constitute the use of independent judgment. Loyalhanna, 332 NLRB at 935 (quoting Providence Hospital, 320 NLRB 717, 732 (1996)).

b. Responsible Direction

In the course of their work assignments, CNAs are not directed to do specific tasks by LPNs. Rather, on a day-to-day basis, CNAs simply know what they are supposed to do and they perform their duties. Generally, an LPN will not direct a CNA to do something specific with respect to a resident unless there is a simple task such as cleaning up spilled water or milk in a bed after a tube feeding. LPNs do instruct CNAs with respect to new orders or new treatments for an existing resident, or treatment for a new resident, based on directives that the LPN has received from doctors or RNs. If a CNA has a problem, the CNA may go to an LPN. Also, if something unusual happens to a resident such as a skin tear, a fall, or respiratory distress, a CNA reports that incident to an LPN, who in turn reports it to a higher authority, or takes immediate action such as having the resident sent to the Emergency Room, if necessary.

As shown above, the LPNs exercise limited direction of the CNAs. The duties and authorities of LPNs as outlined in Beverly Health & Rehabilitation Services, 335 NLRB 635, 669 (2001), enforced in relevant part, 317 F.3d 316 (D.C. Cir. 2003), are comparable to those in the present case. There, the LPNs related particular resident care requirements to CNAs, asked CNAs how things were going, sought information from CNAs, reviewed paperwork of CNAs, and corrected CNAs if they were doing something incorrectly. CNAs consulted LPNs if they had questions and reported unusual resident conditions to LPNs who either dealt with the matter themselves, or reported it to a higher authority. There, as here, the LPNs' direction of CNAs was "merely routine" and did not require independent judgment in that LPNs were directing CNAs in tasks that were largely low-skilled and repetitive. Id. See also Ten Broeck Commons, 320 NLRB at 811.

c. Discipline

The record is insufficient to establish that LPNs have disciplined CNAs. To be sure, the record reflects that that an LPN has authority to send a CNA home if the CNA is verbally or physically abusive to a resident or if the CNA refuses to work a certain hall. However, thereafter, the DON will do an independent follow-up investigation.

The record disclosed three incidents of LPN involvement in sending home a CNA. In the first situation, which occurred a few years ago, a CNA was sent home for refusing to go to another hall because she had finished her hall and did not want to do two halls by herself. In that situation, it is not clear whether an LPN or someone else issued orders for the CNA to go home. In the second situation, which occurred in February 2004, an LPN told a CNA with a bad headache to go home, after the CNA told the LPN that she did not want to go to another hall. The record does not clearly establish whether the CNA was sent home for health reasons or for refusing to go to the other hall. In the third situation, which occurred in August 2004, an LPN sent a CNA home after she refused to change a diaper. In that regard, the DON had earlier issued specific orders with respect to diaper changing.

With respect to the three incidents at issue, the record did not definitively establish that an LPN had, solely on her own initiative, made the decision to send a CNA home. Moreover, although the record showed that that second and third situation resulted in some lost pay due to not working, the evidence did not establish that sending home a CNA, itself, constituted discipline. Rather, all three situations involved a CNA refusing to perform a work assignment. The Board has held that sending an employee home in that type of circumstance does not confer supervisory status. Freeman

Decorating Co., 330 NLRB 1143, 1144 (2000)(sending home employees who are drunk or insubordinate in refusing work assignments is insufficient to establish supervisory status); Phelps Community Medical Center, 295 NLRB 486, 491 (1989)(same). In any event, assuming that LPNs independently made the initial decision to send the CNAs home on those three occasions, there is no record evidence that suggests that the DON did not do an independent follow-up investigation, which is the standard practice.

With respect to other types of discipline, the Administrator testified that LPNs cannot issue discipline. The record did not establish that LPNs have ever independently issued any write-ups or warnings to CNAs that resulted in adverse consequences to employees. One CNA testified that another CNA informed her that she had been written up by an LPN because of the diaper-changing incident discussed above; however, the Administrator testified that there was no write-up in that CNA's personnel file. Another CNA initially testified that a few years ago, she physically saw a write-up by an LPN, but later testified that she did not know who issued the write-up. That same CNA also testified that a few years ago she saw another write-up issued by a different LPN. However, assuming the existence of the latter two write-ups, the evidence did not show whether the write-ups were simply reports subject to independent review, whether any discipline was recommended, or whether any discipline resulted from the write-ups. Thus, the record establishes, that at most, an LPN may have played a role in two write-ups a few years ago. See generally Ten Broeck Commons, 320 NLRB at 812 (nurses not deemed to be supervisors "where their warnings do not result in any personnel action, or, if they do such action is not taken without independent investigation or review by others").

d. Performance Evaluations

Evaluating employees is not one of the primary indicia and is not supervisory unless an evaluation is independently performed and “lead[s] directly to personnel actions affecting those employees, such as merit raises.” Ten Broeck Commons, 320 NLRB at 813 The Administrator testified that the DON rather than LPNs, completes performance evaluations on other employees. There is no evidence that LPNs presently or in the past have had any role in performance evaluations. The only evidence to the contrary is that a CNA testified that an LPN evaluated her job performance six years ago and submitted a document to the DON. That testimony did not establish what aspect of the CNA’s performance was evaluated, whether the DON performed an independent evaluation, or the outcome of the evaluation.

e. Secondary Criteria

The Petitioner points to a number of secondary criteria in support of its arguments that the LPNs at issue here are supervisors. Specifically, the Petitioner contends that LPNs wages are almost twice the rate of CNAs, that two-thirds of the time LPNs are the highest ranking health care providers on site, and that LPNs have a supervisor’s badge. It is settled, however, that in the absence of at least one primary indicium, secondary indicia alone are insufficient to establish supervisory status. Waste Management de Puerto Rico, 339 NLRB No. 39, JD slip op. at 19 (2003). Accordingly, as the record did not establish that LPNs exercise any of the supervisory indicia listed in Section 2(11), I need not consider secondary factors relied on by Petitioner.

f. Conclusion as to Supervisory Status

Based on the foregoing, I conclude that the Petitioner has not met its burden of establishing that the LPNs are supervisors within the meaning of Section 2(11) of the Act.

C. Whether LPNs are required to be included in the unit

As shown above, the Petitioner is seeking a unit of service and maintenance employees comprised of CNAs, laundry employees, kitchen employees, housekeeping employees, and activities employees.⁴ A unit of service and maintenance employees in a healthcare setting, as sought here, is analogous to a “plant wide production and maintenance unit in the industrial sector” and is presumptively appropriate. Marion Manor for the Aged, 333 NLRB 1084, 1094 (2001); Newington Children’s Hospital, 217 NLRB 793, 794 (1995). Here the Petitioner seeks to exclude LPNs, who are customarily considered technical employees, from a unit comprised of service and maintenance employees. Id. at 793-794. (LPNs are properly classified as technical employees on the basis of special schooling, qualifications examinations, and licensure by the state). Accord Hillhaven Convalescent Center, 318 NLRB 1017, 1018 & n.6 (1995).

In considering the appropriateness of a bargaining unit, Congress instructed the Board to make unit findings so as “to assure to employees the fullest freedom in exercising the rights guaranteed by this Act.” 29 U.S.C. Section 159(b). It is settled that the Act does not require that a bargaining unit be the most appropriate unit, only that it be an appropriate unit. Overnite Transportation Co., 322 NLRB 723, 723 (1996).

⁴ The duties and interests of the CNAs have been set forth above. At the hearing, the parties also agreed to include the supply clerk in the unit. Thus, the supply clerk’s wage rate falls within the same general range as the CNAs. The supply clerk orders supplies for the facilities, places supplies in each resident’s room such as water pitchers and bathing pans, and labels those supplies. The supply clerk also assists dietary by ordering supplemental feedings and charging them out. The duties and interests of the remaining

In the health care industry, the Board has sought to limit the proliferation of bargaining units through case law and its rulemaking to achieve that end. In Park Manor Care Center, 305 NLRB 872 (1991), the petitioner sought a unit of service and maintenance employees in a nursing home, excluding technical employees. In that case, the Board set forth its “empirical community of interests” test for determining appropriate bargaining units in non-acute health care facilities, such as nursing homes. Under that test, the Board considers community of interest factors as well as those factors considered relevant by the Board in its rulemaking proceedings on collective bargaining units in the health care industry. Id. at 875 & n.16. The Board indicated that factors to be examined in making such a unit determination included education and training, pay comparisons, distinct functions, contact with other employees, and the relative size of the technical employee group. Id. at 875-877. See generally Hillhaven Convalescent Center, 318 NLRB at 1017 (“whether . . . technical employees may constitute a separate appropriate unit depends on their relationship to other nonprofessional employees”). The rationale with respect to nursing home units stems from the fact that employees at smaller health care facilities such as nursing homes typically have more contact and share more interests with other employees than do employees at larger hospitals. Park Manor Care Center, 305 NLRB at 876; Hillhaven Convalescent Center, 318 NLRB at 1018.

The present case is very similar to those cases which found that LPNs were not required to be included in a unit of service and maintenance employees in a nursing home. Thus here, in comparing LPNs to CNAs and other unit employees, LPNs have greater educational requirements and must be licensed by the State. Although LPNs and

classifications included in the unit—laundry employees, kitchen employees, housekeeping employees and

CNAs both deliver direct care to residents, the LPNs' duties are distinct in that LPNs primarily administer medications to residents and only spend about 3% of their time engaged in assisting residents in their activities of daily living. LPNs earn substantially more than CNAs—they start at \$13 an hour compared to \$7 an hour for a CNA. Finally, a unit of 20 LPNs is sufficiently large to constitute a separate appropriate unit. On the basis of the above, I conclude that the LPNs are technical employees and have interests sufficiently distinct from the service and maintenance employees such that they may constitute a separate, appropriate unit. I shall, therefore, exclude them from the unit sought by Petitioner. See Hillhaven Convalescent Center, 318 NLRB 1017, 1019 (1995) (unit of technical employees at a nursing home consisting of LPNs and one physical therapy assistant may properly be excluded from overall non-professional unit). Accord Lincoln Park Nursing Home, 318 NLRB 1160, 1161-1162 (1995).

D. Whether the remaining classifications are included or excluded from the unit.

The Employer also seeks to include the following classifications in the unit: maintenance supervisor, assistant maintenance supervisor, kitchen supervisor, housekeeping assistant supervisor, medical records clerk, and assistant medical records clerk, while the Petitioner seeks to exclude them. The Employer further seeks to include the admissions clerk in the unit; in its brief, the Petitioner does not challenge this inclusion. As set forth above, the Petitioner seeks to include the ward secretary or ward clerk in the unit.⁵

activities employees—have not been set forth in detail in the record.

⁵ The record is insufficient to determine the inclusion or exclusion of this position. I shall, therefore, allow this individual to vote subject to challenge.

Neither party claims that the maintenance supervisor, assistant maintenance supervisor, kitchen supervisor, or housekeeping supervisor are supervisors under the Act. Accordingly, there is no need to determine if these individuals should be excluded from the unit on the basis of supervisory status. See Bennett Industries, Inc., 313 NLRB 1363, 1363 (1994).

The Petitioner seeks to exclude the maintenance supervisor, assistant maintenance supervisor, kitchen supervisor, housekeeping assistant supervisor, medical records clerk, and assistant medical records clerk, on the grounds that these positions do not share a sufficient community of interest with the unit employees. As shown below, I conclude that all of the disputed classifications share a sufficient community of interest with the unit employees and are commonly included in service and maintenance units. I shall, therefore, include them in the unit.

1. Maintenance Supervisor and Assistant Maintenance Supervisor

Both of these individuals spend about 95% of their time engaged in physical and manual labor in maintaining the Employer's facilities inside and out. These individuals compile a work list and split the tasks between themselves. Their jobs include such tasks as maintaining the outside grounds; fixing electrical outlets, calls bells, overhead lights and the like in residents' rooms; and repairing equipment such as stoves, dishwashers, washers, and dryers. In the course of their work, they have regular contact with other unit employees.

These maintenance positions require a high school degree. The positions pay approximately \$6 more per hour than the CNAs. The positions have the same benefits as the unit employees with the exception that they are paid on the first day of sick leave.

The evidence reflects that these maintenance employees perform the type of routine repair work that is characteristic of unskilled maintenance employees who are customarily included in a service and maintenance unit. Accordingly, I shall include them in the unit. See Marian Manor for the Aged, 333 NLRB 1084, 1094 (2001).

2. Kitchen Supervisor

The duties of the kitchen supervisor include occasional cooking as well as working with the cooks to make sure that the temperature of the residents' food is correct, that the food is properly taken out, thawed, or put away, and that meal carts are set up. The record reflects that this position is hourly paid but does not disclose the wage rate. This position is also paid on the first day of sick leave. This position shares a sufficient community of interest with the unit employees, and I shall, therefore, include it in the unit.

3. Housekeeping Assistant Supervisor

The housekeeping assistant supervisor is primarily engaged in manual labor. This position makes arrangements for residents to move in and out of their rooms, and assists with "odd" jobs such as painting. This position also fills in for absent housekeepers, janitors, and laundry employees. The record reflects that this position is hourly paid, but does not disclose the wage rate. This position is also paid on the first day of sick leave. This position shares a sufficient community of interest with the unit employees, and I shall, therefore, include it in the unit.

3. Medical Records Clerk and Assistant Medical Records Clerk

The medical records clerk maintains the medical records for the residents. The duties of this position include maintaining the records in chronological order, making

sure that the residents' history, physicals, and doctor's signatures are on the residents' charts and that nurse's notes are signed, and alerting doctors when a progress note is due. The assistant medical records clerk essentially engages in the same duties.

These positions have limited work-related contact with unit employees, although they do share common facilities with them. The medical records clerk earns approximately \$4 more per hour than CNAs, whereas the assistant medical record clerk's wage rate is within the same range as the unit employees. Both positions receive the first day sick leave benefit.

Notwithstanding their limited interaction with unit employees, these positions perform the type of clerical functions that are customarily included in service and maintenance units. Accordingly, I shall, therefore, include them in the unit. Marian Manor for the Aged, 333 NLRB at 1094-1095; Lincoln Park Nursing Home, 318 NLRB at 1163-1165.

4. Admissions Clerk

The admissions clerk is responsible for calling area hospitals to inform them of available beds. Once residents are approved, the admissions clerk completes the initial paperwork, makes sure that the rooms are ready for the resident, and visits the residents on a regular basis to see if they are comfortable and their needs are being met. This position has regular contact with other unit employees and works with them to resolve any issues facing the residents. This position is hourly paid and the wage rate is within the same range as unit employees. This position also receives the benefit of being paid on the first day of sick leave.

In its brief, the Petitioner does not challenge the inclusion of this position into the unit. Accordingly, as this type of position is customarily included in a service and maintenance unit, I shall include it in the unit. See Marian Manor for the Aged, 333 NLRB at 1095.

V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Union involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time CNAs, laundry employees, kitchen employees, housekeeping employees, activities employees, the supply clerk, the maintenance supervisor, the assistant maintenance supervisor, the kitchen supervisor, the housekeeping assistant supervisor, the medical records clerk, the assistant medical records clerk, and the admissions clerk employed by the Employer at its Edenton, North

Carolina facility, but excluding all RNs, LPNs, the accounts payable clerk, the accounts receivable clerk, the social worker, and professional employees, guards, and other supervisors as defined in the Act.

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Food and Commercial Workers, Local 426T. The date time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to the Decision.

A. Voting Eligibility

Eligibility to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employee who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for

cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 12367 (1966); NLRB v. Wyman-Gordon Company, 395 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting processes, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 4035 University Parkway, Suite 200, P.O. Box 11467, Winston-Salem, North Carolina, 27116-1467, on or before **Monday, December 20, 2004**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (336) 631-5210. Since the list will

made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. The Board in Washington must receive this request by **December 27, 2004**. The request may not be filed by facsimile.

Dated at Winston-Salem, North Carolina, this 13th day of December, 2004.

/s/ Willie L. Clark, Jr.
Willie L. Clark, Jr.
Regional Director
National Labor Relations Board

Region 11
4035 University Parkway, Suite 200
P. O. Box 11467
Winston-Salem, North Carolina 27116-1467